that the plaintiff was entitled to claim as loss of dependency which was assessed at $14,185.60. In *Gammell's case* the plaintiff's 15-year old son was killed in a road accident. Defendants admitted liability. The only issue in dispute was the quantum of damages. The claim was (1) under section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, and (2) under the Fatal Accidents Act, 1976 for loss of dependency. For the purpose of the 1976 Act the learned Judge assessed the dependency of the plaintiff and his wife at £250 and £1750 respectively. On the claim under the 1934 Act he awarded the plaintiff damages totalling £9,590 made up of (i) £6,656 for the son's loss of future earnings during the years of life lost to him because of the defendants' negligence ('the lost years'), on the basis that he would have earned £416 a year net after deduction of living expenses to which he applied a multiplier of 16 years, (ii) £1,184 for funeral expenses including a sum of £595 for a proposed gravestone, and (iii) £1,750 for loss of expectation of life. Because of the amount of the award under the 1934 Act the learned Judge made no award under the 1976 Act since the son had died intestate and the plaintiff and his wife would receive by virtue of the award under the 1934 Act, more than the value of their dependency. Both the Court of Appeal and the House of Lords upheld the decision of the learned Judge. *Thangavelu's case* and *Gammell's case*[5] are clearly distinguishable. In both cases the common factor was loss of earning following death.

The measure of damages is the pecuniary loss suffered by the defendants as a result of the death. The pecuniary loss is the actual financial benefit of which the dependants have in fact been deprived, whether the benefit was a result of a legal obligation or of what may reasonably have been expected to take place in the future. As Lord Wright said in *Davies* v. *Powell Duffryn Associated Collieries Ltd* at page 617:—

" ..... There is no question here of what may be called sentimental damages, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities ... "

The mere existence of the relationship of husband and wife or parent and child is not enough to show pecuniary loss and does not even raise a presumption of such loss: *New Monckton Collieries Ltd.* v. *Keeling*,[7] *Lee* v. *S.S. Bessie*.[8] These are cases under the Workmen Compensation Act, but the principle is equally applicable to the Fatal Accidents Acts.

In calculating damages the court has to consider the pecuniary sum which will make good to the sufferer, so far as money can do, the loss which he has suffered as the natural result of the wrong done to him. There can be only one award under the Civil Law Act. The award will be either under section 7 or section 8 of the Act. It is not uncommon where the award for loss of dependency exceeds that which could be awarded for loss of expectation of life that the latter becomes merged in the award made under section 7 of the Act. Awards, of course, vary with the circumstances of the case and also from Judge to Judge. Also, each case must depend upon its own facts. In this case the widow has since the death of deceased been receiving monthly payment not less than what deceased was getting from the partnership. Every plaintiff must understand that, if he brings an action for damages it is for him to prove his damage; it is not enough to write down particulars, and, so to speak, throw them at the head of the court by saying that that was what he had lost and that was the amount of damages he would ask for. It is not as simple as that. He has to prove it.

The respondent does not dispute that under *Gammell's case* the award for the lost years was for loss of earning. Assuming that in our case the deceased had not died he would not be able to claim for loss of earning. Except for the partnership earning he was not earning anything. Therefore, where there was no earning there could be no loss of earning. That in fact was the finding of the learned Judge. On the facts as agreed we see no reason to interfere with his decision. The situation is unfortunate but it does not in itself make the learned Judge's assessment erroneous. Accordingly, I would dismiss the appeal with costs. Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *Foo Say Ghee & Co.; Dzaiddin & Co.*

PUBLIC PROSECUTOR v. MUHAMED BIN SULAIMAN

[F.C. (Suffian L.P., Wan Suleiman and Abdul Hamid F.JJ.) August 24, 1982]

[Kuala Lumpur — Federal Court Criminal Appeal No.27 of 1981]

Criminal Law & Procedure — Charge of Murder — Judge directing jury to acquit and discharge accused —

Duty of judge at end of prosecution case in a jury trial – Where there is some evidence which if accepted by jury would establish essential ingredients of charge, judge must let case go on – Evidence of expert – Criminal Procedure Code (F.M.S. Cap. 6), s. 214.

Evidence – Evidence of expert – Whether witness an expert – Evidence Act, s. 45.

In this case the respondent was charged with murder. The only evidence connecting the respondent with the killing was the evidence of a chemist that the bullet recovered from the body of the deceased was fired from the rifle issued to the respondent. The learned trial judge ruled at the end of the prosecution case that the evidence of the chemist was not admissible because (1) there was inadequate evidence of his competency as an expert in fire arms and in the identification of the rifle from which the bullet had been fired and (2) the witness had not produced the data, photos etc. on which he based his conclusion. The learned trial judge accordingly directed the jury under section 214(i) of the Criminal Procedure Code to return a verdict of not guilty, which they did. The appellant appealed.

Held: (1) in this case although the witness had no academic training in forensic ballistics, he might, by virtue of his education, his scientific qualification and his practical experience gained in the Department of Chemistry, be regarded as an expert for the purpose of determining whether or not the bullet had been fired through the respondent's rifle. The learned trial judge was therefore erroneous in treating him as a non-expert;

(2) the learned judge should have treated the evidence given by the expert witness as admissible and left the question of its weight or value to the jury;

(3) the witness's failure to produce the data, photos etc., on which he based his finding was not fatal, for he was not asked by the defence to produce them and if he had been asked he might have produced them;

(4) in a jury trial, where there is some evidence which if it were to be accepted by the jury as accurate, would establish each essential ingredient in the alleged offence, the judge should let the case go on and not direct the jury to acquit and discharge the accused. In this case there was evidence that the witness was a person of good education and considerable experience with firearms and in determining whether a particular bullet had gone through the barrel of a particular rifle; and the learned judge should have let the case go on and not direct the jury to return a verdict of not guilty;

(5) in the circumstances of this case where the case against the accused was not strong, being dependent on rather thin circumstantial evidence, the court would not order a retrial.

Cases referred to:

(1) *The Queen* v. *Silverlock* [1894] 2 Q.B. 766.
(2) *Public Prosecutor* v. *Virammal* A.I.R. 1923 Mad. 178.
(3) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.

[The following cases were also referred to in argument: *Rajkishore* v. *State* A.I.R. 1969 Cal. 321; *State* v. *Madhukar Gopinath* A.I.R. 1967 Bom. 61; *Fakir Mohd. Ramazan* v. *Emperor* A.I.R. 1936 Bom. 151].

FEDERAL COURT.

Shaikh Daud bin Haji Mohamed Ismail (Deputy Public Prosecutor) for the appellant.

Joseph Au (assigned) for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the Judgment of the Court): This is an appeal from a decision of the High Court sitting with a jury in Kuantan acquitting and discharging the accused as directed by the learned Judge pursuant to section 214(i) of the Criminal Procedure Code.

The respondent (whom I shall refer to as the accused) was a Lance-Corporal in the Army. He was charged with murdering his Sergeant.

In July 1978, the 13th Royal Malay Regiment was on operations against communist terrorists in the district of Raub, Pahang. Twelve platoons were deployed in different places. Platoon No. 12 under the command of Sergeant Mokhtar bin Haji Salim, of which the accused was a member, was deployed in a rubber estate in Lembah Klau. They slept in hammocks. The hammocks of the privates were arranged in a circle covering an area twice the size of a tennis court. In the middle of this circle were the hammocks of the Sergeant and four Corporals including the accused.

During the night of July 14, at about 11 p.m. gun fire was heard. It was pitch dark and raining and there was thunder and lightning. In the morning the Sergeant was found dead in his hammock; he had been shot. A bullet P7 was recovered from his left upper arm. Mr. Lum Kon Woon PW36, a Chemist with the Government Chemistry Department in Petaling Jaya, examined the bullet. He test-fired the weapons of all the members of the platoon and examined their bullets; and gave evidence that P7 must have been fired from the rifle P36 which had been issued to the accused prior to the night of July 14. He came to that conclusion from a study of the markings on the bullets examined. That was the only evidence connecting the accused with the killing and without that evidence there would be no case against him. Nobody saw who had shot the Sergeant.

The learned Judge at the end of the prosecution case after considering the submission of Mr.

Au (assigned counsel for the defence) and the reply by the learned Deputy Public Prosecutor, was of the opinion that there was no case for the accused to answer. He ruled that Mr. Lum's evidence was not admissible because (1) there was inadequate evidence of his competency as an expert in firearms and in the identification of the rifle from which the bullet P7 had been fired and (2) Mr. Lum had not produced the data, photos, etc., on which he based his conclusion. Accordingly, the learned Judge directed the jury under section 214(i) of the Criminal Procedure Code to return a verdict of not guilty, which they did.

Shaikh Daud on behalf of the Public Prosecutor, appellant, argues that the learned Judge was wrong in (i) not treating Mr. Lum as a person "specially skilled" in determining whether the bullet P7 had been fired with the accused's rifle; (ii) in thinking that Mr. Lum's failure to produce the data that he had or should have collected to enable him to determine that the bullet had so been fired, was fatal for the purpose of determining whether or not Mr. Lum was an expert, and (iii) in rejecting Mr. Lum's evidence, considering that it had not been destroyed in cross-examination. Shaikh Daud submits that the learned Judge should have left it to the jury to decide whether or not Mr. Lum was an expert and if so what weight to give to his evidence. Finally he submits that in the circumstances we should order a retrial.

It is now convenient for us to reproduce section 45 of the Evidence Act. It reads as follows:

"(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts."

As to the question whether or not Mr. Lum is an expert, it is true that this is a preliminary question to be determined, but it is a question upon which, in practice, considerable laxity prevails. This is because while the expert must be "skilled", he need not be so by special study, he may be so by *experience*; and the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

In *The Queen* v. *Silverlock*[1], identity of handwriting was in question and a solicitor was called to give evidence on it, and Lord Russell C.J. said at page 771:

"It is true that the witness who is called upon to give evidence founded on a comparison of handwritings must be peritus; he must be skilled in doing so; but we cannot say that he must become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge?"

Phipson on Evidence, 11th edition, says in paragraph 1285:

"The competency of the expert is a preliminary question for the judge and is one upon which, in practice considerable laxity prevails. Though the expert must be 'skilled', by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility."

and the learned author cites *Silverlock*[1] as his authority for the above proposition

At the bottom of page 511 the learned author after saying that the opinions of medical men are admissible upon questions within their own province, remarked that even the evidence of unqualified medical practitioners, hospital students and dressers is admissible in appropriate circumstances.

To return to Mr. Lum, he has a B.Sc. (Honours) degree from the University of Malaya, and a diploma in environmental science and technology from Delft, Holland; he is 38; he works full time in the Department of Chemistry. And as to firearms the evidence was that he was trained in the Department by his predecessors who were themselves trained forensic chemists having been trained overseas. Prior to this case he had examined other guns and bullets and had given gun and bullet evidence similar to that in this case in other courts, and his evidence had been accepted as expert evidence.

In view of this we are of the opinion that the learned Judge was erroneous in treating him as a non-expert.

Mr. Lum admitted that he had no academic training in forensic ballistics; but just as a person without academic or professional qualification in handwriting may give evidence on the identity of handwriting, so Mr. Lum by virtue of his education, his scientific qualification and his practical experience gained in the Department might be regarded as an expert for the purpose of determining whether or not the bullet P7 had been fired through the accused's rifle, especially considering that Mr. Lum had not been shaken in cross-examination.

The only question was, is Mr. Lum peritus, is he skilled, is he skilled in determining whether a particular bullet has gone through the barrel of a particular rifle. He need not become so skilled in any particular way nor by special study nor professionally. It is enough if he has had sufficient experience, sufficient practical experience, to acquire the necessary skill, so that he has adequate knowledge.

Mr. Lum gave the evidence disallowed in front of the jury. That was because there was then no objection by counsel to its admission; he objected to it only in his submission at the end of the prosecution case.

The learned Judge should have treated the evidence as admissible and left the question of its weight or value to the jury. If he had left this matter to the jury it would not necessarily follow that they would have agreed that the bullet P7 had gone through the accused's rifle – for Mr. Lum's evidence is only to help them, they are not bound to accept it *in toto* or at all. It is up to them to decide whose rifle it was that fired the bullet that killed the sergeant.

Regarding the question whether or not Mr. Lum's failure to produce the data, photos, etc., on which he based his finding, with respect we do not agree that that was fatal, for in fact he was not asked by the defence to produce them, and if he had been asked he might have produced them. A doctor when testifying in court is not required to produce photographs to prove his findings and in the usual kind of cases there is no reason why firearms experts like Mr. Lum should produce photographs to prove their findings.

In *Public Prosecutor* v. *Virammal*[2] some finger-prints were in question. The lower court rejected the evidence of a finger-print expert on general grounds. Oldfield J. remarked that that attitude was unsound. He said at page 179:

"That attitude ... may have been due to [the lower court's] reluctance to enter into ... the 'science' of finger-prints or to come to close quarters with the evidence of a person described as an 'expert'."

Next follow these significant words:

"But in fact there is nothing in the so-called science of finger-prints or the qualifications of an expert in it, which need have deterred the lower court from applying its own magnifying glass or its own eyes and its own mind to the evidence and verifying the results submitted to it by the witness."

Here Mr. Lum described the nature of a rifle, said that the inside of its barrel had tiny grooves, that a bullet passing through it bears characteristic markings made by the grooves different from markings on a bullet that had passed through other rifles, and that the bullet in question bears markings similar to those that had been test-fired with the accused's rifle. As the lower court in *Virammal* could have applied its own magnifying glass, or its own eyes, and its own mind to the evidence and verifying the results; so the jurors here, if the case had been allowed to go on, could have used a magnifying glass, or their own eyes and their own mind to the evidence and verifying the results submitted to them by Mr. Lum.

We now turn to consider a judge's duty at the end of the prosecution case in a jury trial.

Subsections (i) and (ii) of section 214 of the Criminal Procedure Code provide:

"(i) When the case for the prosecution is concluded the court, if it considers that there is no evidence that the accused committed the offence shall direct the jury to return a verdict of not guilty.

(ii) If the court considers that there is evidence that the accused committed the offence the court shall call on the accused to enter on his defence."

These provisions are *in pari materia* with subsections (1) and (2) of section 194 of the Singapore Criminal Procedure Code before the abolition of jury trial there in 1969.

These provisions are in contrast to our section 190 which deals with the position in a trial by a Judge with the aid of assessors. Section 190 provides:

"190. When the case for the prosecution is concluded the court, if it finds no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence."

Our section 190 is identical with the present section 188(1) of the Singapore Criminal Procedure Code which fell to be considered by the Privy Council in *Haw Tua Tau v. Public Prosecutor*[3]. In the course of considering the functions of judges in Singapore under section 188(1), Lord Diplock drew a distinction between trial by a judge alone and trial by jury.

As regards trial by a judge alone, Lord Diplock observed at page 51:

"What they [i.e. the words 'if unrebutted'] mean is that for the purpose of reaching the decision called for by section 188(1) the court must act on the presumptions (a) that all such evidence of primary fact [elicited during the case for the prosecution] is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences ... in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses."

Then Lord Diplock went on to contrast this with the attitude of the court in a trial with a jury, in the course of which His Lordship said that if there is *some* evidence which, *if it were to be accepted by the jury as accurate,* would establish each essential ingredient in the alleged offence, the judge must let the case go on and not direct the jury to acquit and discharge. His Lordship said at pages 51 and 52;

"The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is most easily identified by considering a criminal trial before a judge and jury, such as occurs in England and occurred in Singapore until its final abolition in 1969. Here the decision-making function is divided; questions of law are for the judge, questions of facts are for the jury. It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which *if it were to be accepted by the jury as accurate,* would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict; but if there is *some* evidence, the judge must let the case go on ..... On the question of the accuracy of the evidence of any witness jurors would be instructed that it was their duty to suspend judgment until all the evidence of fact that either party wished to put before the court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt."

Here there was evidence that Mr. Lum is a person of good education and considerable experience with firearms and in determining whether a particular bullet had gone through the barrel of a particular rifle; and, applying the test laid down by the Privy Council in *Haw Tua Tau (supra),* the learned Judge should have let the case go on and not direct the jury to return a verdict of not guilty.

Finally there remains the question whether or not we should order a retrial. When during Shaikh Daud's reply it was pointed out to him that the alleged offence took place in July 1978 four years ago and owing to the considerable delay it might not be just to order a retrial, he said that he would leave that question to the court, being more interested in the court ruling whether or not the learned trial judge was right in deciding that Mr. Lum was not an expert.

We have examined the record with care and find that the case against the accused is not strong, being dependent on rather thin circumstantial evidence, and had the learned Judge directed his mind to this alone he would have been justified in applying section 214(i) of the Criminal Procedure Code, and in view of this we decline to order a retrial.

Appeal dismissed.

Solicitors: *Au Ah Wah & Co.*

PUBLIC PROSECUTOR v. LING TEE HUAH

[A. Cr. J. (Yusoff Mohamed J.) March 3, 1980]
[Sibu – Criminal Appeal No. K. 2 of 1980]

Criminal Law & Procedure – Corruption – Bribery offered – Use of trap witness – Whether there was sufficient corroboration – Prevention of Corruption Act 1961, s. 14.

Criminal Law & Procedure – Corruption – Investigation by police inspector against senior officer – Nothing in Prevention of Corruption Act 1961 preventing it.

This was an appeal against the decision of the learned magistrate who acquitted the accused of the charge under section 4(b) of the Prevention of Corruption Act, 1961.

In the course of investigation the accused was alleged to have offered PW1 a bribe of $2,000 and a plan was devised to trap him. This occurred on June 23 at a hotel at which place the accused had handed an envelope containing $500 as part payment to PW1. The accused was arrested as soon as he appeared at the hotel lobby.

The learned magistrate found that PW1 was a trap witness and because there was no corroboration he acquitted the accused without calling for his defence.

Held, allowing the appeal:

(1) corroborative evidence need not be direct. It is sufficient if it is merely circumstantial evidence of the accused's connection with the offence;

(2) in law there is nothing to prevent a police inspector to institute investigation into a crime involving